

Pensions and Employment: Pensions Bulletin

27 January 2017 / Issue 2

Legal and regulatory developments in pensions

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For more information, or if you have a query in relation to any of the above items, please contact the person with whom you normally deal at Slaughter and May or [Bridget Murphy](#)

Watch List

The Watch List is a summary of some potentially important issues for pension schemes which we have identified and where time is running out (or has recently run out), with links to more detailed information. New or changed items are in **bold**.

No.	Topic	Deadline	Further information/action
1.	Severance payments and tapered annual allowance pitfall	From 6 th April, 2016	<p>Pensions Bulletin 16/06</p> <p>2.1 Since 6th April, 2016, the £40,000 annual allowance for high income individuals is reduced by way of a taper to a minimum of £10,000 for those with income of £210,000 or more.</p> <p>2.2 For the taper to apply, the individual must have UK taxable income in 2016/17 of:</p> <ul style="list-style-type: none"> ◆ £110,000 “threshold” income, and ◆ £150,000 “adjusted” income. <p>2.3 Any taxable element of a termination package counts towards both threshold and adjusted income. A taxable termination payment could therefore catapult an individual over the £150,000 limit, resulting in a tax charge for the</p>

No.	Topic	Deadline	Further information/action
			<p>member on pension provision already made.</p> <p>2.4 There may be scope for timing taxable termination payments to straddle tax years but care would be needed in view of anti-avoidance provisions. Termination procedures should be reviewed to build in a process to identify and manage this point.</p>
2.	Members who intend to apply for Fixed Protection 2016 (“FP 2016”) must have stopped accruing benefits (note that fixed protection may be lost on joining a registered life cover arrangement)	6th April, 2016	Pensions Bulletin 15/16
3.	Abolition of DB contracting-out: Rule amendments needed	6 th April, 2016	<p>If your scheme was contracted-out on 6th April, 2016 and currently has active members accruing benefits (and who continued to accrue benefits after 5th April, 2016 in the scheme), then your scheme will, more likely than not, require a rule amendment effective from 6th April, 2016 to prevent the inadvertent addition of an additional underpin to the</p> <p>Note: Statutory power to amend, retrospective to 6th April, 2016,</p>

No.	Topic	Deadline	Further information/action
			<p>expires on 5th April, 2017</p> <p>accrued GMPs of those active members. See further Pensions Bulletin 16/03.</p>
4.	Put in place register of persons with significant control (“PSC”) for trustee company where trustee is a corporate	6 th April, 2016	Pensions Bulletin 16/03
5.	Ban on member-borne commissions in DC schemes used for auto-enrolment	5 th July, 2016 at the latest	Trustees must notify “service providers” if the scheme is being used as a “qualifying scheme” for auto-enrolment purposes and some or all of the benefits are money purchase. Pensions Bulletin 16/04 .
6.	Cyclical re-enrolment	Within 6 month window by reference to third anniversary of employer’s staging date	<p>For example employers with a 2013 staging date must complete cyclical re-enrolment process between December 2015 and June 2016.</p> <p>Publication available to clients on request from usual pensions contact.</p>
7.	First Chair’s annual governance statement	Within 7 months of end of scheme year (for scheme years ending on or after 6 th July, 2015)	<p>For example, schemes with a 31st December year end must submit statement by 31st July, 2016.</p> <p>Client note dated June, 2015 available from Dawn Holmes.</p>

No.	Topic	Deadline	Further information/action
8.	“Brexit”	Referendum held on 23 rd June, 2016	<p>8.1 Supreme Court ruled¹ on 24th January, 2017 (8/3) that Article 50 notice triggering 2 year exit period requires an Act of Parliament to authorise the Government to serve that notice.</p> <p>8.2 Consider potential impact on pension schemes. Client publications available on Slaughter and May website.</p>
9.	DC Code of Practice 13 on governance and administration takes effect	28 th July, 2016	Schemes offering money purchase benefits (including money purchase AVCs, insofar as the legislation applies) must familiarise themselves with the revised Code .
10.	GMP equalisation		
10.1	Lloyds Trade Union announces intention to bring GMP equalisation class action	August 2016	We will continue to monitor developments in this litigation, said to be worth £300 million which has implications for all schemes with GMPs accrued in the period 17th May, 1990 to 5th April, 1997.
10.2	DWP publishes consultation proposing methodology for equalising GMPs	28th November, 2016	Pensions Bulletin 16/19
11.	Civil partner/same		

¹ This was predicted in our client seminar on 23rd November, 2016 (albeit 11/0, not 8/3)

No.	Topic	Deadline	Further information/action
	sex spouse pensions: retroactivity pre-5th December, 2005		
11.1	CJEU decision in <i>Parris v. Trinity College, Dublin</i>	Decided on 24 th November, 2016	A ‘death bed marriage’ scheme rule did not indirectly discriminate on sexual orientation grounds. Pensions Bulletin 16/18
11.2	Provisional date for Supreme Court to hear appeal in <i>Walker v. Innospec</i>	March, 2017	To establish whether survivor benefits for civil partners will be retroactive to a date before the Civil Partnership Act 2004 came into force.
12.	Derivatives: New requirements to exchange variation margin	31 st March, 2017	Pensions Bulletin 17/01
13.	PPF Levy		
13.1	Measurement Time for submission of scheme data for 2017/18 PPF levy changed	31 st March, 2017	Pensions Bulletin 16/14
13.2	Submission deadline for most certificates and scheme return	31 st March, 2017, midnight	Pensions Bulletin 17/01
14.	HMRC’s existing practice on VAT and pension schemes ends (please see our item on this in	31 st December, 2017	Employers should consider taking steps to preserve, or even enhance, their pensions-related VAT cover.

No.	Topic	Deadline	Further information/action
	Pensions Bulletin 16/13)		
15.	Data protection: New Regulation	25 th May, 2018	Pensions Bulletin 16/05 Employment Bulletin 16/15
16.	Further EMIR exemption extension for pension scheme arrangements	16 th August, 2018	Pensions Bulletin 17/01
17.	IORP II expected transposition deadline	12 th January, 2019	Pensions Bulletin 16/11

New Law

I. Provision of information regulations amended

1. The Registered Pension Schemes (Provision of Information) (Amendment) Regulations 2017 (SI 2017/11) have been made and come into force on 6th February, 2017.
2. The regulations cover the situation where a lump sum death benefit which is taxable is paid to a trust on or after 6th April, 2016.

Note: Taxable lump sum death benefits are, broadly, lump sum death benefits not paid within 2 years of death or paid

in relation to a person who died age 75 or over.

3. In that event, the scheme administrators of the paying scheme must tell the trustee of the receiving trust about:
 - 3.1 the amount of lump sum death benefit, and
 - 3.2 the tax paid by the scheme administrator.
4. If the lump sum death benefit is taxable the pension scheme will have deducted tax at 45% before paying the benefit to the trustees.
5. The trustees of the receiving trust must then pass on certain pieces of information if they use the benefit to make a payment to an individual beneficiary of the trust.

Comment (1): Since 6th April, 2016, certain lump sum death benefits² are subject to income tax at the individual's marginal income tax rate. Before that date a flat rate of 45% tax was applied, for which the scheme administrator was liable.

Comment (2): However, where the lump sum death benefit is paid to someone

other than an individual (such as a trust), the scheme administrator will still be liable to tax at 45%.

Comment (3): This will often result in an overpayment of tax, and to claim that overpayment the individual will need to have certain pieces of information, as provided for under the regulations.

6. The regulations also make minor technical changes to the annual allowance information given to members in consequence of the transitional rules for 2015-16 and the introduction of the taper.

Tax

II. Pensions tax on overseas pensions - guidance

1. On 3rd January, 2016, a new chapter 3 was added to HMRC's draft [guidance on pension tax for overseas pensions](#). Comments are sought until 1st February, 2016.
2. The new chapter 3 covers registered pension schemes established outside the UK, known as 'non-UK registered schemes'.

3. From 6th April, 2017, a new chapter 5A of Part 4 of the Finance Act 2004 will set out the tax treatment for non-UK registered schemes.
4. The new legislation is to replace the non-statutory coverage of the subject set out in the Pensions Tax Manual (PTM114000).
5. Under the [Finance Bill 2017](#), the general rule will be that Part 4 of the Finance Act 2004 will apply to non-UK registered pension schemes, but only to the extent of the member's UK-relieved funds.
6. The position differs for the annual allowance and taxable property provisions.
7. The member's input into a non-UK registered pension scheme will count towards the annual allowance if new regulations provide that they are to do so.
8. The taxable property provisions impose tax charges where a scheme administrator of an investment-regulated pension scheme takes certain steps regarding residential property or tangible moveable property.

² Broadly, lump sum death benefits not paid within 2 years of death or paid in relation to a person who died age 75 or over

9. Those provisions will apply to non-UK registered pension schemes as if the scheme were established in the UK.
10. The Government currently intends to restrict such charges to situations where the taxable property is directly or indirectly held in the UK, however.

III. Salary sacrifice and flexible benefit plans

1. The draft Finance Bill 2017 was published on 5th December, 2016.
2. This included draft legislation relating to the proposed changes to the tax treatment of salary sacrifice and other “optional remuneration arrangements”.
3. As expected, the proposed changes will not affect salary sacrifices relating to registered pension schemes.
4. Also, the changes will not affect salary sacrifices relating to life cover provided under either registered or non-registered schemes on the death of employees.
5. A client note on the changes to the tax treatment of salary sacrifice schemes is available to clients, from your usual contact on request.

³ It is unclear whether this conclusion is being challenged by the targets.

Cases

IV. Silentnight - judicial review claim against 2nd warning notice fails

The Administrative Court has rejected, on 10th January, 2017, a claim for judicial review brought by the targets of a 2nd warning notice in relation to the Silentnight Group DB Scheme.

A. Facts

1. A US private equity group, the HIG Group, bought the assets of Silentnight Group Limited (“**Silentnight**”) in May 2011.
2. The asset purchase took place as part of a pre-pack administration, triggered by a subsidiary of the HIG Group which had bought Silentnight’s senior debt.

Comment (1): Ordinarily, purchasers of a company’s assets are beyond the reach of the Pensions Regulator’s moral hazard powers. This is because such a purchaser will not be “connected” or “associated” with the sponsoring employer.

Comment (2): The Regulator will need to establish that such a connection or association exists in

relation to the HIG Group and Silentnight if it is to impose a contribution notice in this instance.

Comment (3): Connection or association is usually established by shareholding. However, it is possible for one company to be connected or associated with another where the directors are accustomed to acting in accordance with the directions or instructions of the other company.

Comment (4): In such circumstances, a company is said to be an associate of another company because it exerts “control” over the other.

Comment (5): In this case the Regulator had concluded that the requisite level of control had been established³.

3. The pension scheme was, and remains, in deficit and is likely to enter the PPF.
4. Following evidence from an expert who was an insolvency practitioner and chartered accountant, the Regulator issued its 1st warning notice in December, 2014, addressed to various entities (“**the targets**”) involved in the purchase of the assets

of Silentnight (who are the claimants in the case referred to below).

5. That notice informed the targets of a possible contribution notice of £17.16 million.
6. The 2nd warning notice was issued to the targets in June, 2016, following the advice of an asset-backed lending expert who thought that the business need not have been sold at all.
7. That 2nd notice warned that the contribution notice in contemplation would be for the entire pension scheme deficit.
8. The covering letter sent with the 2nd warning notice stated that that warning notice was being given in addition to the 1st warning notice.
9. The targets sought an order that the 2nd warning notice be declared unlawful or quashed.

B. Decision

1. The Administrative Court decided that the court should lean strongly against allowing a judicial review where Parliament has provided a statutory appeal procedure.
2. There was an alternative statutory procedure for dealing with warning notices, determinations by the Determinations Panel and appeals to

the Tribunal and then to the Court of Appeal.

3. The court decided that the statutory procedure should deal with the targets' argument that the Regulator did not have power to issue the 2nd warning notice while the 1st warning notice was still live.
4. The court also took this view in relation to the targets' assertions that the Regulator had exercised its power unlawfully by:
 - 4.1 going expert-shopping, and
 - 4.2 not behaving "with even-handedness" in connection with the experts' evidence.
5. The targets also argued that the Administrative Court should step in because they would need to expend considerable sums if left to pursue their arguments via the statutory process.
6. The court considered this argument to be one of convenience, noting that the court should guard against judicial review simply because it is more convenient.
7. More generally, the court considered that it would not be right to create a precedent by becoming involved in this instance. To do so would encourage similar judicial review

applications whenever statutory proceedings generated procedural issues.

R (on the application of Grace Bay II Holdings SARL and others) v The Pensions Regulator

Comment: The court's decision was unsurprising and the Regulator was quick to issue a [press release](#) on 12th January, 2017 about the ruling.

V. LGPS not required to tell member about nature of scheme investments

The Pensions Ombudsman has ruled, on 25th November, 2016 that a defined benefit scheme was not required to tell individuals joining the scheme about the nature of the scheme's investments.

A. Facts

1. Mrs D had joined the West Yorkshire Pension Fund, in the Local Government Pension Scheme ("LGPS") twice, once in 2000 and again in 2008.
2. A guide to the scheme was provided each time but the guide did not explain the nature of the scheme investments. She is currently a deferred member.
3. Mrs D sought a refund of contributions in 2014 because she was unhappy with the scheme investments, including the

payment of interest on cash, in light of her religious and ethical beliefs.

4. The scheme refused her request because she did not satisfy the 2-year minimum period of qualifying service for a contribution refund to be available.
5. Mrs D complained to the Ombudsman.

B. Decision

1. The Ombudsman dismissed the complaint.
2. Since benefits under a DB scheme were not dependent on the performance of assets, assuming a solvent sponsoring employer, details of those assets did not need to be provided under:
 - 2.1 the Pensions Regulator's Public Service Toolkit, and
 - 2.2 the Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013 .
3. The Ombudsman noted that the Public Service Toolkit and the Disclosure regulations required schemes to provide a statement that the pension payable will depend on several factors, including investment returns.

4. However, the requirement for such a statement arose only in relation to money purchase benefits.
5. Where someone holds strong beliefs, the responsibility should be with them to make all of the enquiries necessary to understand what they are entering into and paying for.

Mrs D - [PO-10901](#)

Comment (1): The Disclosure regulations do not require schemes to provide detailed information about each scheme investment, whether at the start of membership or on an ongoing basis.

Comment (2): Members may request an investment report, however (under the Disclosure regulations) which must include an assessment of, amongst other things, the nature of the scheme's assets.

VI. No duty to tell member change of calculation of future CETVs

The Ombudsman has ruled, on 25th November, 2016, that the trustees of a DB scheme did not have a duty to tell the member that the basis for calculating cash equivalent transfer values ("CETVs") had changed for future CETVs.

A. Facts

1. Mr E asked for a CETV statement in March, 2015 from the Northern Foods Pension Scheme.

2. He did not sign the paperwork for the transfer to go ahead within the 3-month CETV guarantee period, however.
3. During that period, the basis upon which CETVs were calculated by the scheme was altered for future CETVs.
4. A second CETV statement was issued in July, 2015 showing a significantly lower CETV. The transfer went ahead.
5. Despite having gone ahead with the transfer, Mr E complained about the sudden, significant reduction in his CETV.
6. He raised the point that the reduction coincided with the introduction of pension freedoms, which became available on 6th April, 2015.

B. Decision

1. The complaint was rejected.
2. The Ombudsman noted that the Occupational Pension Schemes (Transfer Values) Regulations 1996 provided for CETVs to be calculated on an actuarial basis.
3. The factors that could be taken into account were broad. One factor could relate to the possibility of an increase in CETV requests:
 - 3.1 due to changes in legislation,

- 3.2 where it is thought that the calculation of CETVs on the existing basis would result in transfer values that are too high, and
- 3.3 would therefore be detrimental to the remaining members.
4. The Ombudsman noted that the calculation of CETVs was a matter for trustees to decide, based on their actuary's advice. It was not within the Ombudsman's remit to direct trustees on the appropriateness of actuarial factors and assumptions.

Mr E - [PO-13558](#)

VII. Scheme should offer unauthorised late PCLS - PO ruling

The Ombudsman has ruled that a scheme should have offered the complainant an additional lump sum to address the fact that he had been underpaid a pension commencement lump sum ("PCLS").

This was despite the fact that, if paid, the additional amount would be classed as an unauthorised payment.

A. Facts

1. Mr E was a member of the Wildfowl & Wetlands Trust Pension Scheme, which closed to accrual in 2005.

2. The Trustees believed that a deed of amendment entered into at the time had frozen pensionable salaries.
3. Mr E took early retirement in December, 2012 and took a PCLS.
4. However, in 2014, it was discovered that the link to final salary had not been broken and Mr E's pension and PCLS ought, therefore, to have been higher.
5. The scheme administrator told Mr E that it could not pay him an additional amount to reflect the higher PCLS calculation because he had retired over a year ago so any further PCLS would be an unauthorised payment.
6. To address the shortfall, Mr E's pension was increased in May, 2015 and arrears were backdated to the date of his retirement.
7. Mr E complained to the Ombudsman.

B. Decision

1. The Pensions Ombudsman agreed with Mr E's complaint that he should have been offered an additional amount to reflect the correct, higher, PCLS.
2. The action taken by the Trustees did not place Mr E in the position that he would have been in had the mistake not occurred.

3. Under Section 241 of the Finance Act 2004 an unauthorised payment is exempt from being chargeable if, amongst other things the payment is made:
 - 3.1 to comply with a court order; or
 - 3.2 on the ground that a court is likely to order the making of the payment, or would be if asked to do so.
4. The Ombudsman considered that HMRC may not to impose a tax charge, given the circumstances.
5. However, were any charges to arise, the Ombudsman thought that the Trustees should pay since the mistake was made on their part.
6. In the event of Mr E deciding to take the additional lump sum, a mutually agreeable arrangement should be reached between him and the administrator for the repayment of any overpaid pension already made since May, 2015.

Mr E - [PO-12248](#)

Points in practice

VIII. IORP II published in the Official Journal

1. The final text of IORP II ([Directive 2016/2341](#)) was published in the Official

Journal of the European Union on 23rd December, 2016.

2. The Directive enters into force on the 20th day following its publication in the Official Journal.
3. Member States have 2 years within which to implement a Directive following its ‘in force’ date.
4. The transposition deadline is therefore 12th January, 2019.
5. Article 65 of IORP II confirms that the previous IORP Directive (2003/41/EC) will be repealed with effect from 13th January, 2019.

Comment: We will be producing a separate briefing note on IORP II shortly.

IX. First fines for master trusts failing to complete chair’s statement

1. The Regulator has issued a [press release](#), dated 9th January, 2017, announcing its first fines against a number of master trust schemes which failed to complete a chair’s statement.
2. The requirement for a chair’s statement was introduced on 6th April, 2015 by the Occupational Pension Schemes (Charges and Governance) Regulations 2015.
3. The requirement applies to schemes which provide money purchase benefits other than those arising from AVCs.

4. The fines were imposed upon the trustees of the following master trusts:

- 4.1 Nurture Master Trust;
- 4.2 Save and Prosper Personal Retirement Account;
- 4.3 Save and Prosper Company Pension Scheme; and
- 4.4 Save and Prosper Personal Retirement Account Simplified Pension Scheme.

5. The Section 89 Regulatory Intervention Report (linked to in the press release) emphasises that the maximum fine was imposed on the Nurture Master Trust trustee, MC Trustees Ltd, because it is a professional trustee and there were no mitigating factors for a reduction in the fine.

Comment (1): The Regulator’s 16th December, 2016 response to its 21st Century Trusteeship discussion paper ([Pensions Bulletin 17/01](#)) states that it plans to set out the standards expected of chairs and professional trustees.

Comment (2): The response also states that the Regulator intends to clarify the definition of ‘professional trustees’ in its penalty policy consultation, scheduled for the first part of 2017.

X. Loss of personal data - ICO penalty notice

1. The Information Commissioner’s Office (“ICO”) issued a [penalty notice](#), dated 5th January, 2017, to Royal & Sun Alliance Insurance PLC for contravention of the 7th data protection principle.
2. The 7th data protection principle, contained in the Data Protection Act 1998, requires that:
“Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data”.
3. A portable network attached storage device containing personal data relating to 60,000 customers, was stolen from a data server room by a member of staff or a contractor.
4. The device was password protected but unencrypted.
5. Access to the data server room was not sufficiently restricted and there was no CCTV in the room.
6. There was also a failure to monitor routinely whether the device was still online.
7. The £150,000 fine was imposed under Section 55A of the Data Protection Act 1998.

Comment (1): Data controllers must comply with several data protection principles which are set out in the Data Protection Act 1998.

Comment (2): The new EU General Data Protection Regulation (“**GDPR**”) will have direct effect throughout the EU on 25th May, 2018.

Comment (3): Current penalties of up to £500,000 will increase under the GDPR to fines of up to 4% of annual worldwide turnover, or 20 million Euros, whichever is greater.

Comment (4): It is likely that the UK’s post-Brexit data protection regime will remain largely aligned with the GDPR.

Comment (5): Please see our [client briefing](#) on processing under the GDPR and why UK organisations should prepare for the GDPR despite Brexit. For all our data protection publications please click [here](#).

If you would like to find out more about our Pensions and Employment Group or require advice on a pensions, employment or employee benefits matters, please contact [Jonathan Fenn](#) or your usual Slaughter and May adviser.

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